U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

May 16, 1996

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

Re: CC Docket 96-98
Regulatory Flexibility Act Analysis

Dear Mr. Caton:

The Office of Advocacy of the Small Business Administration transmits herewith the original and 16 copies of its comments in response to the Initial Regulatory Flexibility Analysis in the above-referenced docket. Included with this package is a duplicate "file copy" of this pleading. Please date stamp this copy and return it to the messenger delivering this filing.

Thank you in advance for your assistance in this matter. If you have any questions, please contact me or David Zesiger at 202/205-6532.

Respectfully submitted,

Jere W. Glover
Chief Counsel

Enclosures

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OFFICE OF CHIEF COUNSEL FOR ADVOCACY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
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Comments of the Chief Counsel for Advocacy of the United States Small Business Administration on the Regulatory Flexibility Act Analysis

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SUMMARY

The Office of Advocacy believes the IRFA in the instant Notice is defective on three grounds. First, it attempts to isolate Regulatory Flexibility Act analysis from the remainder of commentary on the proposed rule. Second, it attempts to exclude an important population of small telecommunications entities that will be seriously affected by the proposed rule. Finally, the IRFA fails to perform the analysis required by the RFA and thus fails to comply with the RFA.

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The Office of Advocacy of the Small Business Administration respectfully submits the following comments in response to the Initial Regulatory Flexibility Act Analysis submitted by the Commission in conjunction with the Notice of Proposed Rulemaking in the above-referenced matter.[1] The Office of Advocacy finds the instant IRFA fails to comply with the Regulatory Flexibility Act[2] in the following ways.

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 96-182, CC Docket No. 96-98 (rel. April 19, 1996) (hereinafter "Notice"). The Office of Advocacy has submitted comments under separate cover addressing the balance of the Notice. Some of the proposals contained therein arguably pertain to the Initial Regulatory Flexibility Analysis ("IRFA") and should therefore also be consulted as the Commission reviews comments on its IRFA.

[2] Regulatory Flexibility Act of 1980, as amended, Pub. L. No. 96-354, 94 Stat. 1164 (1980), codified at, 5 U.S.C. 601 et seq.

I. IT IS CONTRARY TO THE REGULATORY FLEXIBILITY ACT THAT COMMENT ON AN IRFA BE SEPARATED FROM COMMENT ON THE BALANCE OF A NOTICE.

The Notice requires that commenters submit comments on the IRFA under "a separate and distinct heading designating them as responses to the [IRFA]."[3] The Office of Advocacy objects to this requirement as contrary to the Regulatory Flexibility Act ("RFA").

Requiring commenters to separate their RFA commentary and analysis from the main body of commentary on the Notice runs directly contrary to the intent and overall thrust of the RFA. The intent of the RFA is to require agency personnel to conduct an analysis of the impact of a proposed rule. It is significant that to the best knowledge of this Office, no other agency has attempted to isolate its regulatory flexibility analysis as does the instant IRFA.

The Notice's requirement forces both commenters and the Commission and its staff to remove their small business policy analysis from the remainder of their analysis. Of course, the RFA's chief purpose is to accomplish precisely the opposite. This approach will handicap the Commission's own efforts to analyze the impact of its own rule on small businesses.

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[3]Notice at para. 286.

A proper IRFA should allow commenters to integrate their IRFA comments into the main body of their analysis. Exceptions, exclusions, and alternatives for small businesses can only be meaningfully analyzed in the context of a discussion of the substance of the rules in question. Otherwise, the purported analysis is an empty exercise.

The Office of Advocacy suggests that an acceptable approach would be to allow commenters to integrate their small business analysis into the body of their comments, but to require commenters to highlight the sections within their filings that deal with the rule's impact on small businesses. Precedent for such an approach can be found in the instant Notice which requests that "comments also must clearly identify the specific portion of this [Notice] to which a particular comment or set of comments is responsive. If a portion of a party's comments does not fall under a particular topic listed in the outline of this Notice, such comments must be included in a clearly labelled section at the beginning or end of the filing."[4]

II. THE COMMISSION EXCEEDS ITS AUTHORITY IN ATTEMPTING TO EXCLUDE ALL INCUMBENT LECs FROM THE RFA

The IRFA purports to exclude all incumbent local exchange carriers (LECs) from the scope of its IRFA. It states, "we

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[4]Notice at para. 291.

believe that the Regulatory Flexibility Act is inapplicable to this proceeding insofar as it pertains to incumbent LECs."[5] In doing so, the IRFA has effectively attempted to make a unilateral size standard determination without consulting the SBA.

Any attempt to exclude a group of small businesses from the coverage of the Regulatory Flexibility Act necessarily involves a size standard determination. That this is what the IRFA has undertaken is further underscored by its stated justification for excluding incumbent LECs. The IRFA states: "Incumbent LECs do not qualify as small businesses since they are dominant in their field of operation."[6]

The focus of the Office of Advocacy's concern here is with the question of the Commission's authority to make this determination. We do not here address the merits of the size standard the Commission has attempted to make. On the question of the Commission's authority, the answer is clear: the statutory authority to make size standard determinations rests

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[5]Notice at para. 275. It is unnecessary at this point in time to consider the merits of the Commission's unilateral determination. This Office simply questions the Commission's authority to make such a determination.

[6]Notice at para. 276.

with the SBA.[7]

The consequences of the Commission's attempted exclusion could be significant. There are over 1,300 LECs, the vast majority of which are smaller companies.[8] The rules being proposed in the instant Notice will fundamentally alter the local exchange market and will significantly alter many LECs' status in their own markets. It is clear that a substantial number of small incumbent LECs could suffer a significant impact from the rules proposed herein. Ultimately, the Commission simply does not have the authority to do what it purports to do -- that is to arbitrarily cut off a set of small businesses from the procedural protections afforded them under the RFA.

III. THE IRFA FAILS TO UNDERTAKE THE ANALYSIS REQUIRED BY THE RFA

Section 603 of the RFA requires that an agency undertake an initial regulatory flexibility analysis when it publishes a general notice of proposed rulemaking.[9] The instant Notice

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[7]Section 3(a)(2) of the Small Business Act states in relevant part: "the head of a Federal agency may not prescribe for the use of such [agency] a size standard for categorizing a business concern as a small business concern, unless such proposed size standard ... is approved by the Administrator." 15 U.S.C. 632(a)(2).

[8]Federal Communications Commission, Statistics of Communications Common Carriers vi (1994/5). Of the over 1,300 LECs, 52 report over $100 million in annual revenues.

[9]5 U.S.C. 603.

contains a section entitled "Regulatory Flexibility Analysis." This section, however, fails to comply with several of the requirements listed in section 603.

Section 603(b)(4) requires an agency to give "a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record."[10] The IRFA is silent on what reporting requirements the proposed rule may or may not impose on the small entities the IRFA concedes are covered by the RFA.[11] In contrast, the IRFA offers a brief description of the reporting requirements the rule would impose on small entities the IRFA contends are not covered by the RFA. The IRFA states only that the rule would require incumbent LECs "to submit documentation requested by state commissions for arbitration concerning the rates, terms and conditions for interconnection and network element unbundling."(emphasis added)[12] In the final analysis, the IRFA appears to contend that the proposed rule will require the submission of no documentation whatsoever.

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[10]5 U.S.C. 603(b)(4).

[11]The IRFA describes the small entities affected as "small interexchange carriers and small, new LEC entrants". Notice at para. 281.

[12]Notice at para. 283.

A brief glance at the balance of the Notice suffices to dismiss this idea out of hand.

Even more importantly, section 603 requires an IRFA to contain "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[13] The IRFA states "[t]he Notice of Proposed Rulemaking solicits comments on alternatives."[14] It is true that the Notice contains a large number of alternatives to the different rules it proposes. Outside of the IRFA and the brief discussion of the rural telephone exemption, however, none of these alternatives is designed to minimize the impact of the proposed rules on small businesses. The words "small" and "business" simply do not occur in sequence anywhere in the Notice apart from the IRFA.

Moreover, section 603(c)(4) specifies that an IRFA shall discuss "significant alternatives such as ... an exemption from coverage of the rule, or any part thereof, for such small entities."[15] Apart from a discussion of the statutory exemption for a "rural telephone company", the Notice contains no

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[13] 5 U.S.C. 603(c).

[14] Notice at para. 285.

[15] 5 U.S.C. 603(c)(4).

other exemption specifically tailored for a small entity.

In sum, the instant IRFA fails to comply with the requirements set forth in the RFA.

IV. CONCLUSION

The IRFA included in the instant Notice is defective on several counts. It attempts to separate the required RFA analysis from the remainder of the proposed rule. It attempts to exclude a large number of small incumbent LECs from the procedural protections of the RFA. Finally, it fails to comply with the most basic requirements specified in the RFA for an IRFA. In sum, it attempts to foreclose procedural remedies for many small entities who cannot help but be profoundly affected by the proposed rule.

Respectfully submitted:

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Assistant Chief Counsel